LEE TECK TENG

v.

LAU CHEONG

HIGH COURT MALAYA, IPOH
ABDUL MALEK AHMAD J
[CIVIL SUIT NO. 23-120-88]
20 APRIL 1989

CIVIL PROCEDURE: *Application under O. 18 r. 19(1) of the Rules of the High Court 1980 - Dismissed - Subject-matter above RM100,000 Interpretation of 'or' - Disjunctive or conjunctive - Section 68(2) Courts of Judicature Act 1964 - Leave to appeal.*

The defendant applied by way of summons-in-chambers to strike out the writ of summons and statement of claim pursuant to O. 18 r. 19 of the Rules of the High Court 1980. The application was dismissed with costs.

Consequently, the defendant applied for leave to appeal despite the amount being more than RM100,000.

Held:

[1] The word 'or' in s. 68(2) of the Courts of Judicature Act 1964 is disjunctive.

[2] As such in cases where the subject matter is above RM100,000 no leave to appeal is required after the issuance of the Judge's certificate that no further argument are required.

[Application for leave refused.]

Cases referred to:

Tractors Malaysia Bhd. v. Tio Chee Hing [1973] 2 MLJ 1
Tio Chee Hing v. Tractors Malaysia Bhd. [1973] 1 MLJ 66
Sivagami Achi v. P.RM. Ramanathan Chettiar & Anor. [1959] 25 MLJ 221
New Straits Times (Malaysia) Bhd. v. Kumpulan Kertas Niaga Sdn. Bhd. & Anor. [1985] 1 MLJ 226
Golden Century Development Sdn. Bhd. & Anor. v. Ganhoe & Anor. [1982] CLJ (Rep) 106
AG of Duchy of Lancaster v. L. & N.W. Railway Co. [1892] 3 Ch 274
Wenlock v. Moloney [1965] 1 WLR 1238
Dow Hager Lawrance v. Lord Norreys & Ors. [1890] 15 AC 210
Loh Holdings Sdn. Bhd. v. Peglin Development Sdn. Bhd. & Anor. [1984] 1 CLJ (Rep) 211

Legislation referred to:

Courts of Judicature Act 1964, s. 68(2)
Rules of the High Court 1980, O. 18 r. 19(1)

For the plaintiffs - Yeow Khoon Kwong; M/s. Yeow & Company
For the defendants - K. Kirubakaran; M/s. Chan & Kiru

JUDGMENT

Abdul Malek Ahmad J:

The defendant had applied by way of summons-in-chambers filed on 14 June 1988 for an order that:

(i) the writ of summons dated 29 April 1988 and the statement of claim dated 23 April 1988 filed by the plaintiff against the defendant be struck out pursuant to O. 18 r. 19(1) of the Rules of the High Court 1980 (hereinafter "the Rules") and that the action commenced herein by the plaintiff against the defendant be dismissed;

(ii) that the plaintiff do pay to the defendant costs of and incidental to this application; on the grounds that:

(a) the statement of claim in this action is scandalous, frivolous or vexatious; and/or

(b) the writ and statement of claim in this action is an abuse of the process of the Court;

(c) further grounds of this application are as fully set out in the affidavit of Lau Cheong affirmed on 13 June 1988 and filed herein.

At the hearing of the application, learned Counsel for the defendant had raised the grounds of illegality and election. On illegality, he referred to the statement of claim and stated that it dealt with facts relating to a claim in contract, namely, indemnity and also to a claim in tort, that is, negligence.

Counsel went on to state that the plaintiff had alleged that he was a licensed moneylender when in actual fact it was his firm, which was not a party and of which he is a partner, which was a licensed moneylender, and that on the advice of the defendant, he had lent money to Emas Jati (M) Sdn. Bhd. (hereinafter "EJ") for which agreements were drawn up as security for the loan. Consequently, Counsel maintained that since the contract on which the claim was based was illegal, the Court was not in a position to allow the claim for indemnity to continue. Counsel further argued that the claim for negligence was dependent on the success of the indemnity claim.

As regards the issue of election, Counsel submitted that there was no mention of the transactions between the plaintiff and EJ being moneylending transactions in another suit filed by the plaintiff against EJ (Ipoh High Court Civil Suit 2035/85 - hereinafter "the earlier suit") and instead they had been described as sale and purchase agreements for which the plaintiff was asking for specific performance. This action against the defendant, Counsel added, was inconsistent with the fact that the plaintiff had already filed the earlier suit on the same subject matter against EJ.

Learned Counsel for the plaintiff told the Court that the plaintiff had a reasonable cause of action against the defendant and that the earlier civil suit was not against the defendant but against EJ. He conceded that the facts were overlapping in the two cases but this did not amount to enforcing two inconsistent rights against the same defendant. Counsel also explained that the plaintiff was in a dilemma and he had to sue on the sale and purchase agreements as, on the face of it, they were valid transactions.

The idea, he clarified, was to get the defendant in the other suit, namely EJ, to say that they were moneylending transactions and not valid sale and purchase agreements, and to get the other case heard first he had in fact made an application for an early trial, and furthermore, he made it clear that this action had to be filed to avoid the time bar should the other case not be heard in time. The essence of this case, he said, was to show that the defendant here, who is an advocate and solicitor, had wrongly advised the plaintiff to do what he did. There was also the element of negligence of performance of duty as the defendant had not ascertained the amount of redemption sum for the ten titles involved in the sale and purchase agreements.

It is therefore necessary, in the circumstances, to refer to the statement of claim in the earlier suit. There, the plaintiff had sued EJ and had alleged that the parties had entered into six separate written agreements for the purchase by the plaintiff of six lots of land at RM48,000 per lot and subsequently about fourteen months later the same parties had entered into similar agreements for another four lots of land at the same price. According to the plaintiff, he had paid only RM35,000 leaving a balance of RM13,000 for each lot. EJ, however, had refused to effect the redemption of the said pieces of land from Oriental Bank Berhad to which they were charged despite the plaintiff's readiness, ability and willingness to pay the balance sums due. As such, the plaintiff had accordingly claimed for specific performance of the ten agreements and costs.

In this particular suit, the plaintiff had sued the defendant who he alleged was his family solicitor in whom he had great confidence and trust. The plaintiff had pleaded in his statement of claim that the defendant, knowing that the plaintiff was in the moneylending business, had suggested to the plaintiff to lend money with proper security to selected borrowers recommended by the defendant at an interest rate higher than that provided by the Moneylenders Ordinance 1951 on condition that the defendant was paid one fifth of all interest earned from such loans for his professional services. Accordingly, the defendant had recommended EJ to the plaintiff for a loan of RM210,000 at 5% interest per month with the first six pieces of land referred to in the earlier suit as security. A similar arrangement was made for the second four pieces of land as referred to in the earlier suit for a loan of RM140,000 to EJ.

Apparently, EJ had failed to service the interest on the said loans and disputed the *bona fide* of the ten agreements as sale and purchase transactions. To enforce the security, the plaintiff had instructed the defendant to have the relevant transfer forms, which had been earlier prepared, completed and submitted to the Collector of Stamp Duty on payment of RM6,630 stamp duty. The plaintiff subsequently discovered that the redemption sum was more than RM130,000 as originally stated. It was therefore the plaintiff's contention that it was because of the defendant's negligence as particularised in the statement of claim that the plaintiff was now praying for RM350,000 as special damages for the unrecovered loans, RM6,630 for the stamp duty and interest on both amounts and costs. It is of course by now obvious and understandable, having perused the allegations made in the statement of claim in this case, why the defendant, who is an advocate and solicitor, wants to have the matter struck out at this stage before the matter is heard at a full trial.

The Privy Council in *Tractors Malaysia Bhd. v. Tio Chee Hing* [1973] 2 MLJ 1 had overruled the Federal Court decision in *Tio Chee Hing v. Tractors Malaysia Bhd.* [1973] 1 MLJ 66 which had allowed an appeal against the setting aside of a writ of summons on the grounds that it was frivolous and vexatious and that the plaintiff was estopped from bringing the

action. The Federal Court had held that the statement of claim had raised triable issues which were *prima facie* sustainable and the action should proceed to trial. However, the facts of that case are distinguishable as a consent judgment had been obtained and the appellant had filed the second action after his application to set aside the judgment was dismissed. The trial Judge and the Privy Council were of the view that the second action ought not to be allowed on the ground that it was brought to defeat the course of justice in the hope of delaying the execution of the judgment in the earlier action where consent judgment had been obtained.

Some thirty years ago, the case of *Sivagami Achi v. P.RM. Ramanathan Chettiar & Anor.* [1959] 25 MLJ 221 had ruled that every paragraph of a pleading must be viewed in its relation with the others and cannot be viewed in isolation and that where triable issues of fact and law have been raised, the summary jurisdiction of the Court cannot be involved.

In *New Straits Times (Malaysia) Bhd. v. Kumpulan Kertas Niaga Sdn. Bhd. & Anor.* [1985] 1 MLJ 226, the Federal Court had allowed an appeal against the High Court's decision to strike out the statement of defence stating that the test to be applied is whether on the face of the pleading, the Court is prepared to say that the cause of action of the defence is obviously unsustainable. They further held that triable issues of fact had been raised which could only be resolved by *viva voce* evidence at the trial and not merely by affidavit evidence. Similarly, in *Golden Century Development Sdn. Bhd. & Anor. v. Ganhoe & Anor.* [1982] CLJ (Rep) 106, the Federal Court had pertinently pointed out that the summary procedure under O. 18 r. 19 of the Rules can only be adopted where it is clearly seen that a claim or answer is on the face of it obviously unsustainable. In their judgment, they had made reference to *AG of Duchy of Lancaster v. L. & N.W. Railway Co.* [1892] 3 Ch 274 where a similar finding had been made.

In *Wenlock v. Moloney* [1965] 1 WLR 1238, the Court of Appeal was of the view that the trial of issues of fact on affidavit evidence to determine whether the plaintiff had a case was an usurpation of the functions of a trial Judge and that the procedure was wholly improper. This was, of course, in line with the earlier case of *Dow Hager Lawrance v. Lord Norreys & Ors.* [1890] 15 AC 210 which held that the jurisdiction to dismiss an action summarily ought to be very sparingly exercised and only in very exceptional cases.

Again, the Federal Court, in *Loh Holdings Sdn. Bhd. v. Peglin Development Sdn. Bhd. & Anor.* [1984] 1 CLJ (Rep) 211, where the fact of their being two actions are somewhat similar to our present situation, had said that under O. 18 r. 19 of the Rules, pleadings will only be struck out in plain and obvious cases and that so long as the statement of claim disclosed some ground of action, the mere fact that the plaintiff is unlikely to succeed at the trial is no ground for striking out.

Having perused the pleadings in both the actions and considered the authorities, I was of the opinion that the arguments of Counsel for the defendant were devoid of merit. In both the actions, the plaintiff had a valid ground of action and the causes of action were also different, with different defendants, although they both arose from the same transactions. In the event, I could come to no other conclusion but to dismiss the defendant's application with costs.

Consequently, Counsel for the defendant had applied the leave to appeal despite the amount being more than RM100,000 and in view of s. 68(2) of the Courts of Judicature Act 1964 where there are conflicting opinions as to whether the word "or" before the words "unless leave is obtained" is disjunctive or conjunctive. My view is that the "or" is disjunctive

otherwise "and" would have used in the drafting. This would mean that if the aggrieved party who is not satisfied with a Judge's decision made in chambers had applied for further arguments in open Court and had obtained the Judge's certificate that no further arguments are required, as had been done in this case, he need not apply for leave to appeal. However, since the application had been, to my mind, unnecessarily made, I had refused the leave. I may, of course, be in error as regards the interpretation of this particular section but, being of the considered opinion that the application for leave was unnecessary in any event in view of the certificate, had prepared these grounds even after the formal refusal of leave to appeal.

Also found at [1989] 2 CLJ 638